NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2483-21

IN THE MATTER OF THE APPLICATION OF THE TOWNSHIP OF LAWRENCE, COUNTY OF MERCER.

JAS GROUP ENTERPRISES, INC.,

Plaintiff-Appellant,

v.

PUBLIC SERVICE ELECTRIC AND GAS COMPANY, INC.,

Defendant-Respondent.

Submitted November 9, 2022 – Decided February 1, 2023

Before Judges Messano, Rose and Gummer.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Docket Nos. L-1538-15 and L-0172-22.

The Platt Law Group, PC, attorneys for appellant (Christopher J. Norman, on the briefs).

Public Service Enterprise Group Incorporated, attorneys for respondent (Natalie F. Dallavalle, on the brief).

Eckert Seamans Cherin & Mellot, LLC, attorneys for Township of Lawrence, County of Mercer (David M. Roskos, on the statement in lieu of brief).

PER CURIAM

Plaintiff JAS Group Enterprises, Inc. (plaintiff or JAS), a real estate developer, appeals from an April 4, 2022 Law Division order dismissing its amended complaint in lieu of prerogative writs against defendant Public Service Electric and Gas Company, Inc. (defendant or PSE&G) in Mercer County Docket No. L-0172-22 (utility matter), and denying its motion for equitable relief in Mercer County Docket No. L-1538-15 (Mount Laurel action). We affirm.

We summarize the pertinent facts and procedural history, which are wholly undisputed and accurately stated in the motion judge's decision. JAS is a "designated inclusionary developer in Lawrence Township's Fair Share Affordable Housing Plan for the Third-Round Cycle." A court-approved settlement agreement between the Township of Lawrence and the Fair Share Housing Center in the Mount Laurel action provided for the development of affordable rental housing at Block 5101, Lot 18. The initial agreement

contemplated a 300-unit development, with sixty affordable rental units on Block 5101, Lot 18. JAS is involved in that project.

In response to JAS's application for utility service, on July 20, 2018, PSE&G provided a "will serve" letter. PSE&G estimated the lead times for gas and electric services was approximately five to six weeks based, in part, on the customer's readiness for service.

Thereafter, the scope of the project was reduced to 189 units, with forty-two units set aside for affordable housing. Because the project did not move forward within one year of JAS's initial application, PSE&G cancelled plaintiff's request for service. JAS then reapplied; PSE&G responded that the global supply chain issues could delay service for one year.

In a December 17, 2021 email, counsel for JAS requested PSE&G reconsider its position, contending PSE&G's "notice [of a possible one-year delay was] inconsistent with the terms of the 'will serve' letter," which estimated a five- to six-week delivery of service. Counsel also asserted that as a public utility, PSE&G must give priority to the project "to facilitate the production of

affordable housing to serve the regional need under the Mount Laurel doctrine."[1] In its January 12, 2021 email, PSE&G denied JAS's request.

On January 27, 2022, JAS filed a complaint in the utility matter against PSE&G. In the complaint, JAS sought equitable relief, demanding PSE&G immediately issue a "will serve" letter. On that same date, in the Mount Laurel action, JAS also moved to intervene, consolidate its utility matter, and for equitable relief compelling PSE&G to issue a "will serve" letter.[2]

On February 8, 2022, PSE&G issued a "will serve" letter, generally stating utility "service can be made available for the . . . project consistent with service requirements and the PSE&G tariffs for gas and electric services." On March 4, 2022, PSE&G filed a motion to dismiss the complaint in lieu of answer for lack

---

[1] See S. Burlington Cnty. N.A.A.C.P. v. Twp. of Mount Laurel, 67 N.J. 151, 174 (1975) (Mount Laurel I) (holding municipalities are constitutionally required to provide a realistic opportunity for the development of low- and moderate-income housing); S. Burlington Cnty. N.A.A.C.P. v. Twp. of Mount Laurel, 92 N.J. 158, 279-81 (1983) (Mount Laurel II) (reaffirming Mount Laurel I, and providing real estate developers a remedy to challenge the denial of their affordable housing plans that violated municipal zoning codes for the failure to comply with the Mount Laurel doctrine).

[2] Plaintiff does not appeal from the denial of its intervention and consolidation motions in the Mount Laurel action. An argument not raised on appeal is deemed waived. Zaman v. Felton, 219 N.J. 199, 226-27 (2014); see also Pressler and Verniero, Current N.J. Court Rules, cmt. 5 on R. 2:6-2 (2023).

of subject matter jurisdiction and failure to state a claim. See R. 4:6-2(a) and (e).

On March 7, 2022, JAS filed an amended complaint in the utility matter, styled as a "complaint in lieu of prerogative writs." Asserting PSE&G's failure to give the project priority status "violate[d] the spirit of the Mount Laurel [d]octrine," JAS in count one demanded PSE&G "immediately issue a 'will serve' letter for" the project and any future inclusionary projects serviced by PSE&G in Mercer County. JAS further sought judgment: (1) declaring PSE&G was constitutionally required "to facilitate the production of affordable housing in New Jersey" given its status as a "quasi-public utility"; and (2) granting "equitable relief to compel PSE&G to confer 'priority status' to [p]laintiff's affordable housing project" and deliver service by April 8, 2022 (count one).

In response to the amended complaint, PSE&G supplemented its motion to dismiss, raising four arguments: (1) JAS failed to exhaust administrative remedies because the Board of Public Utilities (BPU) has exclusive jurisdiction over the allegations raised; (2) the relief sought in count one was rendered moot by defendant's February 8, 2022 "will serve" letter; (3) JAS's reliance on the Mount Laurel doctrine was misplaced; and (4) the complaint was improperly filed as an action in lieu of prerogative writs, and if PSE&G were subject to an

action under Rule 4:69, the complaint was untimely filed.[3] In its responding argument, JAS countered: the Mount Laurel doctrine is not limited to municipalities and extends to the "operations of state agencies with significant control over land development"; "exclusive jurisdiction over all matters pertaining to the implementation of the Mount Laurel doctrine" lies in the Superior Court; and PSE&G's delay in processing JAS's application jeopardized plaintiff's "ability to claim New Jersey Housing and Mortgage Financing Agency . . . tax credit financing necessary to develop the forty-two affordable housing units at this project."

Following oral argument on April 1, 2022, Mercer County Assignment Judge Robert Lougy reserved decision. On April 4, 2022, the judge issued an order, granting defendant's motion to dismiss the complaint in the utility matter, and denying plaintiff's motions in the Mount Laurel action. In the accompanying statement of reasons, Judge Lougy squarely addressed the issues raised in view of the governing law.

Addressing the allegations raised in count one, the judge found PSE&G's February 8, 2022 "will serve" letter rendered moot JAS's demand. The judge

[3] The parties' briefs were not provided on appeal. See R. 2:6-1(a)(2). We glean their arguments as framed by the motion judge.

further found JAS had failed to plead any "facts to suggest that it ha[d] standing to assert claims on behalf of municipalities, other developers, or persons needing affordable housing."

Turning to count two, the motion judge found that although JAS likely had standing to bring an action under "Mount Laurel and its progeny, it cannot do so against PSE&G." The judge elaborated:

> Plaintiff provides no persuasive authority to justify an ad hoc expansion of Mount Laurel to public utilities and to bootstrap this [c]ourt's responsibilities under Mount Laurel into an encroachment of [the] BPU's regulatory authority. PSE&G is a private entity that serves millions of New Jersey residents and operates in a highly regulated industry. For this [c]ourt to redirect its scarce resources towards one development without any insight into the needs of those other residents would be contrary to PSE&G's tariff and dangerously uninformed of other customers' needs and the promotion, preservation, and maintenance of the state's power grid.
>
> The parties agree PSE&G is a "public utility" within the meaning of the Department of Public Utilities Act [N.J.S.A. 48:2-13(a)] and is therefore subject to regulation by the BPU[,] . . . . [which] has exclusive jurisdiction to regulate the transmission and distribution of public utilities such as the electricity provided by PSE&G, see N.J.S.A. 48:2-13(d), provided that the BPU ensures no public utility gives "undue or unreasonable preference [or advantage] to" any customer, see N.J.S.A. 48:3-4. BPU administers that charge to require that every utility furnish services in a nondiscriminatory manner, see N.J.A.C. 14:3-3.1(a),

> except in specific cases of emergency, none of which expressly provides for Mount Laurel obligations. See N.J.A.C. 14:29-2.5[to] -4.[2]. Count Two of the complaint alleges "PSE&G has refused to confer 'priority status' to [JAS's] affordable housing project" despite PSE&G's "constitutional responsibilities to facilitate the production of affordable housing in [N]ew Jersey as a 'quasi-public utility'" under the Mount Laurel doctrine. . . . However, current BPU rules prohibit PSE&G from conferring such status upon JAS, see N.J.A.C. 14:3-3.1(a), and PSE&G is not authorized to change those rules or operate by its own accord under a more expansive interpretation of them, see N.J.S.A. 48:2-13(d). Only the BPU can.

The judge therefore dismissed count two for failure to exhaust administrative remedies.

According to its merits brief, JAS filed an "emergent" petition for relief with the BPU on April 5, 2022.[4] While the administrative matter was pending, on April 19, 2022, we granted plaintiff's emergent application for permission to file a motion for injunctive relief and issued a briefing schedule. On that same

[4] While its appeal was pending before us, JAS filed a letter pursuant to Rule 2:6-11(d), annexing the Administrative Law Judge's (ALJ) September 29, 2022 initial decision on its April 5, 2022 petition. The ALJ rejected JAS's contention that the Mount Laurel doctrine extends to PSE&G. JAS asserted the ALJ's decision "eliminated" plaintiff's failure to exhaust administrative remedies. In its responding letter, PSE&G countered the ALJ's initial decision is not a final agency decision and, as such, plaintiff's procedural deficiency has not been cured.

date, plaintiff filed a notice of appeal from the April 4, 2022 order. On April 25, 2022, we denied plaintiff's motion.

Plaintiff now raises three arguments for our consideration, contending: (1) subject-matter jurisdiction over the issue of affordable housing lies exclusively with the courts and, as such, the judge erroneously dismissed the complaint for failure to exhaust administrative remedies; (2) the judge erroneously denied JAS's motion to compel PSE&G to provide service on a priority basis "no later than April 8, 2022"; and (3) fundamental fairness and the equitable estoppel doctrine compel an order requiring PSE&G to deliver service "by May 1, 2022." Having considered plaintiff's contentions in view of the applicable law, and pursuant to our de novo review of the record, Castello v. Wohler, 446 N.J. Super. 1, 14 (App. Div. 2016), we conclude they lack sufficient merit to warrant extended discussion in our written opinion. R. 2:11-3(e)(1)(E). We affirm substantially for the reasons expressed by Judge Lougy in his well-reasoned decision. We add only the following brief comments.

It is well settled that jurisdiction to decide Mount Laurel affordable housing disputes lies with the courts. See In re N.J.A.C. 5:96 & 5:97, 221 N.J. 1, 3 (2015). However, the Mount Laurel doctrine "impose[s] an affirmative obligation on every municipality to remove unnecessary cost-producing

requirements and restrictions that are 'barriers to the construction of their fair share of lower income housing.'" Bi-Cnty. Dev. of Clinton v. Borough of High Bridge, 174 N.J. 301, 320 (2002) (emphasis added) (quoting Mount Laurel II, 92 N.J. at 259).

Indeed, JAS cited no persuasive authority before the motion judge, or on appeal, extending a municipality's Mount Laurel obligations to PSE&G or any other quasi-public utility. See Plainfield v. Public Serv. Elec. & Gas Co., 82 N.J. 245, 259 (1980) (describing PSE&G as a "quasi-public regulated entity"). Nor has our research revealed any such authority. However, even if the court had jurisdiction to decide JAS's complaint,[5] as the judge correctly recognized, PSE&G was prohibited under the governing statutes and regulations from conferring priority status on JAS's project.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.

CLERK OF THE APPELLATE DIVISION

[5] Although not challenged on appeal, the motion judge also found JAS had incorrectly filed its complaint as an action in lieu of prerogative writs. Recognizing plaintiff could remedy that procedural defect by filing an amended complaint, the judge astutely decided the motions on their merits.